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Constitutional Law—Balancing Test in Durational Residence Equal Protection Analysis—Williams v. Zobel, 619 P.2d 448 (Alaska 1980), prob. juris. noted, 101 S. Ct. 1344 (1981)

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CONSTITUTIONAL LAW—BALANCING TEST IN DURATIONAL RESIDENCE EQUAL PROTECTION ANALYSIS—*Williams v. Zobel*, 619 P.2d 448 (Alaska 1980), *prob. juris. noted*, 101 S. Ct. 1344 (1981).

In April of 1980 Alaska's legislature passed the permanent fund income distribution statute[1] and the income tax exemption statute.[2] The first

1. Alaska Sess. Laws ch. 21 (1980) (codified at ALASKA STAT. §§ 43.23.010–.100 (Supp. 1980)). The pertinent sections of the statute read:

Sec. 43.23.010. ELIGIBILITY FOR PERMANENT FUND DIVIDEND. (a) An individual who is eligible under (b) of this section is entitled to one permanent fund dividend for each full year that the individual is a state resident after January 1, 1959.

(b) For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

(c) To determine the number of permanent fund dividends to which an individual is entitled under (a) of this section, a year in which the individual is a state resident for less than 12 months may not be counted, but a payment of a permanent fund dividend may be made for that year under (f) of this section.

. . . .

(f) If an individual who is eligible under (b) of this section was a state resident for less than 12 months during the year immediately preceding the year in which a claim is filed, the individual is entitled to payment of one prorated dividend. If that individual is also entitled to dividends under (a) of this section based on previous years as a state resident, he is entitled to receive a prorated payment for the total number of permanent fund dividends to which he is entitled under (a) of this section. A prorated dividend or prorated payment under this subsection shall be prorated on the basis of the number of months that the individual was a state resident during the year immediately preceding the year in which the dividend is claimed.

. . . .

Sec. 43.23.030. AMOUNT OF DIVIDEND. By December 1 of each year the commissioner shall give public notice of the value of each permanent fund dividend to be paid in the following year. The commissioner shall determine the value of a permanent fund dividend by

(1) determining the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 43.23.050(b) in the current year, less the amount, if any, to be repaid in the current year to the general fund under AS 43.23.050(c);

(2) determining the number of permanent fund dividends paid during the current year; and

(3) dividing the amount determined in (1) of this section by the amount determined in (2) of this section.

. . . .

Sec. 43.23.100. DEFINITIONS. In this chapter,

(1) "Alaska permanent fund" means the fund established by art. IX, § 15, of the state constitution;

. . . .

(6) "permanent fund dividend" means a right to receive a payment of money from the dividend fund;

(7) "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state or, if he is not physically present in the state, intends to return to the state and he is absent for the following reasons:

(A) vocational, professional or other special education for which a comparable program was not reasonably available in the state,

statute provides for an annual distribution of the interest income on the state permanent fund,[3] which consists of one-half of the oil royalties and lease income received by the state. State residents[4] would receive one dividend payment each year based on the current year's dividend rate[5] multiplied by the number of full years of residency in Alaska since 1959,[6] the year Alaska became a state.[7] Alaska residents who have lived in the state less than a full year in the dividend year would receive a prorated dividend based on the number of months of residency.[8] The income tax ex-

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(B) postsecondary education,

(C) military service,

(D) medical treatment,

(E) service in Congress, or

(F) other reasons which the commissioner may establish by regulation under the Administrative Procedure Act (AS 44.62);

(8) "year" means a calendar year.

2. Alaska Sess. Laws ch. 22 (1980) (repealed 1980) provides:

INDIVIDUAL TAX EXEMPTIONS. (a) If an individual filed an Alaska net income tax return and reported gross income earned from sources in the state for three or more years preceding the tax year for which an exemption is claimed under this section, the income of that individual is exempt from taxation under this chapter in each succeeding tax year.

(b) An individual is exempt from payment of two-thirds of the net income tax levied under this chapter if the individual filed an Alaska net income tax return and reported gross income earned from sources in the state for two tax years preceding the tax year for which an exemption is claimed under this section.

(c) An individual is exempt from payment of one-third of the net income tax levied under this chapter if the individual filed an Alaska net income tax return and reported gross income earned from sources in the state for one tax year preceding the tax year for which an exemption is claimed under this section.

3. ALASKA CONST. art. IX, § 15 provides:

ALASKA PERMANENT FUND. At least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

Alaska's Legislature raised the amount of rentals, royalties, proceeds, payments and bonuses to be placed in the permanent fund to 50 percent. Alaska Sess. Laws ch. 18, § 5 (1980) (codified at ALASKA STAT. § 37.13.010 (Supp. 1980)).

4. ALASKA STAT. § 43.23.100(7) (Supp. 1980).

5. ALASKA STAT. § 43.23.030 (Supp. 1980).

6. ALASKA STAT. § 43.23.010 (Supp. 1980).

7. This is not the only Alaska statute that attempts to keep Alaska residents from leaving the state. The Alaska longevity bonus statute, ALASKA STAT. §§ 47.45.010–.170 (1979), provides for payment of $1,800 per year to Alaska residents who are 65 years of age or older and 25-year residents. (The law also states that only those residents who lived in the state prior to or on January 3, 1959 are eligible for payments.) The Pioneer's Home statute, ALASKA STAT. §§ 47.25.010–.100 (1979), provides for admission to state supported retirement homes for 15-year residents who either are needy, or can provide compensation to the state on a daily basis for their care (the daily rate is relatively low). Both statutes are designed to help Alaskans living on low and fixed incomes to maintain their residency in the state. *See* ALASKA STAT. § 47.45.170 (1979).

8. ALASKA STAT. § 43.23.010(f) (Supp. 1980).

emption statute eliminates individual state income tax liability on a graduated basis depending on the number of state income tax returns filed by the individual in the three years prior to the filing year in question.[9]

Ronald and Patricia Zobel, two-year residents of Alaska, successfully challenged both plans in Alaska's superior court on the ground that they violated the equal protection guarantee of the Alaska constitution.[10] The Alaska Supreme Court, ruling separately on the statutes, affirmed the lower court on the income tax exemption statute in *Williams v. Zobel (Zobel I)*[11] but reversed and upheld the permanent fund income distribution statute in *Williams v. Zobel (Zobel II)*[12]. In both plurality opinions, the Alaska court applied a balancing test it had developed for state equal protection analysis.[13] The court further held, in *Zobel II*, that the permanent fund income distribution statute did not violate the equal protection clause of the fourteenth amendment to the United States Constitution.[14]

This note analyzes the *Zobel II* opinion and concludes that it was correctly decided both under the two-tier analysis employed by the United States Supreme Court and the balancing approach adopted by the Alaska court. Since this case is before the United States Supreme Court on appeal, this note urges the Court to adopt the Alaska balancing test for durational residence equal protection cases[15] as a replacement for the traditional two-tier analysis.

I. BACKGROUND OF DURATIONAL RESIDENCE EQUAL PROTECTION ANALYSIS

In order to understand the development in durational residence equal protection analysis that *Zobel II* represents, it is helpful to summarize the development of equal protection analysis in both the United States and the Alaska Supreme Courts. Equal protection analysis of challenged legislation has evolved into a two-tier test.[16] Courts apply the upper tier, strict

9. Alaska Sess. Laws ch. 22, § 1 (1980) (repealed 1980). *See* note 2 *supra*.

10. ALASKA CONST. art. I, § 1 provides, in part: "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law; . . ."

11. 619 P.2d 422 (Alaska 1980).

12. 619 P.2d 448 (Alaska 1980), *prob. juris. noted*, 101 S. Ct. 1344 (1981).

13. The test is also called the *Erickson* test. *See* State v. Erickson, 574 P.2d 1 (Alaska 1978). *See also* notes 42–44 and accompanying text *infra*.

14. U.S. CONST. amend. XIV, § 1 provides, in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

15. Adoption of the balancing approach for all equal protection analysis cases should be considered. An argument for this position is, however, beyond the scope of this note.

16. *See generally* Shapiro v. Thompson, 394 U.S. 618 (1969); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670–72 (10th ed. 1980).

judicial scrutiny,[17] when they find that the state has infringed on certain fundamental constitutional rights[18] or has used suspect classifications.[19] Otherwise, courts apply a deferential rational relationship test.[20] The effect of subjecting a challenged law to strict scrutiny is, usually, to find it unconstitutional,[21] whereas statutes are usually upheld under the rational relationship test.[22] It is not always clear, however, which level of scrutiny applies in a particular case.

A. *The United States Supreme Court's Durational Residence Equal Protection Analysis*

The United States Supreme Court applies strict scrutiny analysis to durational residence statutes when it finds that the statute adversely affects

17. The heightened scrutiny requires two things. First, the legislation must be justified to promote a "compelling state interest." Second, the classification used must be fairly and substantially related to the state's interest. *See generally* Shapiro v. Thompson, 394 U.S. 618 (1969); G. GUNTHER, *supra* note 16, at 670–72.

18. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1002–10 (1978). *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (fundamental right to equal litigation opportunity); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to interstate travel); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (fundamental right to vote).

19. *See* L. TRIBE, *supra* note 18, at 1012–19. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (racial classification of persons of Japanese ancestry is "suspect"). The Alaska Supreme Court held that the classification of recent interstate migration is suspect in State v. van Dort, 502 P.2d 453 (Alaska 1972). The United States Supreme Court has not followed this analysis. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975).

Declaring that recent interstate migration is a suspect classification merely extends the problems caused by the two-tier analysis. *See* notes 61–63, 111 & 112 and accompanying text *infra*. Also, such a holding by the United States Supreme Court would necessitate overruling *Sosna*. The Alaska Supreme Court wisely changed its course by adopting a balancing test for durational residence equal protection cases in *Zobel I*, instead of continuing its automatic application of strict scrutiny in those cases.

20. As originally construed, the command of equal protection was that the statute must "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Reed v. Reed, 404 U.S. 71, 76 (1971). Paraphrased, the test of equal protection was only that governments must not impose differences in treatment "except upon some reasonable differentiation fairly related to the object of regulation." G. GUNTHER, *supra* note 16, at 670 (quoting Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)). This deferential view is still the basis for the rational relationship test.

21. *See generally* G. GUNTHER, *supra* note 16, at 671; L. TRIBE, *supra* note 18, at 1000 ("When expressed as a standard for judicial review, strict scrutiny is, in Professor Gunther's formulation, 'strict' in theory and usually 'fatal' in fact.").

22. *See* G. GUNTHER, *supra* note 16, at 671 (referring to the rational relationship test as, essentially, an abdication of judicial authority).

the constitutional right to travel.[23] Thus, if no adverse effect on the right to travel is found, the state can regulate on durational residence grounds to the extent that the statute bears a rational relationship to a legitimate state purpose, assuming that no other fundamental right or suspect classification is present. The Court's determination of what constitutes a sufficient penalty on the right to travel to trigger strict scrutiny has passed through three phases since 1969.

First, the Court determined that denials of certain state benefits or fundamental rights penalize the right to travel. In *Shapiro v. Thompson,*[24] the Court found that the state's denial of welfare benefits, deemed a "basic necessity of life,"[25] to new state residents was a penalty on the right to travel, thereby triggering strict scrutiny. Subsequently, in *Dunn v. Blumstein,*[26] the Court held that denying a fundamental right such as voting to newly arrived residents also demands strict scrutiny. This holding led some to believe that all durational residence statutes required strict scrutiny.[27]

In the next phase the Court indicated that the right to travel must be penalized beyond a certain level before strict scrutiny is triggered.[28] In *Memorial Hospital v. Maricopa County,*[29] for example, the Court held

23. The right to travel in this context means the right to travel and settle interstate. The Alaska Supreme Court referred to this as the right to migrate. Although not explicitly in the United States Constitution, it is generally conceded that the right to travel between the states is a fundamental constitutional right. *See Zobel I,* 619 P.2d 422, 425 n.5 (Alaska 1980).

24. 394 U.S. 618 (1969).

25. "[Basic necessities of life are] the very means to subsist—food, shelter, and other necessities of life." *Id.* at 627.

26. 405 U.S. 330 (1972). *See also* United States v. Guest, 383 U.S. 745, 758 (1966) ("freedom to travel throughout the United States has long been recognized as a basic right under the Constitution").

27. The Court first stated in very broad language, that "[d]urational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period." This statement is apparently qualified in the next sentence: "Such laws . . . discriminate against [new residents by] denying them the opportunity to vote." 405 U.S. at 334–35 (footnote omitted). This raises two questions: (1) whether all statutes that penalize the right to travel trigger strict scrutiny, no matter how slight the penalty; and (2) whether all statutes that include a durational residency requirement ipso facto penalize the right to travel. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

28. The first signs of this phase appeared the year after *Shapiro* with the Court's summary affirmance of Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971), which upheld a one-year residency requirement for reduced tuition purposes. The district court in *Starns* found that while the durational residence requirement involved in that case may affect the right to travel, the effect was not a penalty that would trigger strict scrutiny. Thus statutes with durational residence requirements do not automatically penalize the right to travel.

The Supreme Court indicated in Vlandis v. Kline, 412 U.S. 441, 452 n.9 (1973), that it continued to approve of its affirmance of *Starns. See also Zobel II,* 619 P.2d 448, 451 n.9 (Alaska 1980), *prob. juris. noted,* 101 S. Ct. 1344 (1981).

29. 415 U.S. 250 (1974).

that denial of free non-emergency medical benefits to newly arrived indigents required strict scrutiny. The Court noted that the impact on the right to travel could be framed in terms of deterrence to travel as well as penalties on actually travelling.[30] It did not make clear the amount of impact required to give rise to strict scrutiny.[31] Nor did the Court define standards for determining the amount of penalty on the right to travel.

Finally, in *Sosna v. Iowa*,[32] the Court appeared to balance the government's interests in the residence classification against the infringement on the right to travel, yet claimed to retain the two-tier test. The Court found that denying access to divorce courts until residents lived in the state for one year did not trigger strict scrutiny. In *Sosna* the state's interests were sufficiently important to outweigh the interests of the individual since the individual was not "irretrievably foreclosed from obtaining some part of what she sought."[33] Although the Court refused to apply strict scrutiny,

30. *Id.* Although the Court considered the amount of impact on the right to migrate as involving two elements, it is helpful to note that they are not distinct concepts. The amount of penalty involved may well give rise to or add to the deterrent effect of the statute. It is not at all clear whether a durational residency statute could deter migration without having the threat of a penalty. A showing of actual deterrence is not necessary to trigger strict scrutiny. *Id.* at 257–58.

31. The Court, in *Maricopa County*, stated:

> Although any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be *per se* unconstitutional. The Court's holding was conditioned, 394 U.S. at 638 n.21, by the caveat that some "waiting-period *or* residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." *The amount of impact required to give rise to the compelling-state-interest test was not made clear.* The Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration. . . . Second, the Court considered the extent to which the residence requirement served to *penalize* the exercise of the right to travel.

415 U.S. at 256–57 (footnote omitted) (emphasis added).

32. 419 U.S. 393 (1975). For a fuller analysis of *Sosna* see 22 N.Y.L. SCH. L. REV. 121 (1976).

33. 419 U.S. at 406. The Court stated that "[s]he would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State. Iowa's requirement [merely] delayed her access to the courts. . . ." *Id.* This comment spawned the attempted distinction between delay and denial in *Zobel II*. *See* text accompanying notes 70–72 *infra*. The distinction is, however, illusory. In *Sosna*, access to the courts at the present time was denied, just as access to welfare payments at the present time was denied in *Shapiro*. Alternatively viewed, access to the courts in *Sosna* is merely delayed just as access to welfare benefits in *Shapiro* was merely delayed.

The distinction between delay and denial is correctly demonstrated by the *Sosna* Court's short discussion of Boddie v. Connecticut, 401 U.S. 371 (1971), a due process case. 419 U.S. at 410. In *Boddie*, Connecticut had denied access to its divorce courts to those who could not afford to pay the required fee. The Court struck down this scheme since it was a total denial of access to the courts. In contrast, the Iowa plan delayed access to the courts for only a year. It is not possible to draw a clear distinction between *Sosna* on the one hand and *Shapiro*, *Dunn*, and *Maricopa County* on the other based on a delay-denial notion.

The real difference is the amount of impact on the person whose right to travel is penalized or deterred. The Court thus views the denial or delay of welfare benefits to the potential recipient as a greater penalty on the right to travel than the denial or delay of access to the courts to the potential divorcee.

the review of the statute in *Sosna* was more rigorous[34] than the traditional rational relationship test.[35] The apparent addition of a middle level of scrutiny makes it difficult to determine what level of analysis the Court will use in durational residency cases.[36]

B. The Alaska Court's Equal Protection Analysis

The Alaska court initially followed the federal two-tier equal protection analysis for claims brought under the equal protection clause of the Alaska constitution.[37] Discontent arose with the two-tier analysis, largely

34. Justice Rehnquist, writing for the majority, found substantial justifications behind the Iowa divorce statute. Such justifications included the state's interest in marital status and property rights, in avoiding officious intermeddling in matters in which another state has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack. 419 U.S. at 406–07. He then balanced the amount of impact on the right to migrate, both the penalty and deterrent aspects, and the impact on the right to access to the divorce courts against the state's justifications in enacting the statute. *Id.* at 407–09. He concluded that the state justifications outweighed the constitutional claims of Mrs. Sosna.

Finally, Justice Rehnquist examined the substantiality of the relationship between the classification and the state's justifications:

> The State's decision to exact a one-year residency requirement as a matter of policy is therefore buttressed by a quite permissible inference that this requirement not only effectuates state substantive policy but likewise provides a greater safeguard against successful collateral attack than would a requirement of bona fide residence alone.

Id. at 408 (footnote omitted). Consequently, the Court upheld the constitutionality of the statute.

35. Justices Marshall and Brennan, in a strong dissent, noted the divergence from previous equal protection analysis. Justice Marshall felt that:

> The Court today departs sharply from the course we have followed in analyzing durational residency requirements since *Shapiro v. Thompson*. . . .
>
> As we have made clear in *Shapiro* and subsequent cases, any classification that *penalizes* exercise of the constitutional right to travel is invalid unless it is justified by a compelling governmental interest. . . .
>
> The Court's failure to address the instant case in these terms suggests a new distaste for the mode of analysis we have applied to this corner of equal protection law. In its stead, the Court has employed what appears to be an *ad hoc* balancing test, under which the State's putative interest in ensuring that its divorce plaintiffs establish some roots in Iowa is said to justify the one-year residency requirement. . . .
>
> The Court omits altogether what should be the first inquiry: whether the right to obtain a divorce is of sufficient importance that its denial to recent immigrants constitutes a penalty on interstate travel. In my view, it clearly meets that standard.

419 U.S. at 418–19 (Marshall, J., dissenting) (emphasis added).

36. *See* text accompanying note 21 *supra*.

37. Although applying a two-tier structure, the Alaska Supreme Court interpreted *Dunn* as making recent interstate migration a suspect classification. State v. van Dort, 502 P.2d 453, 454 (Alaska 1972) (declaring a 75-day residency requirement in order to vote unconstitutional). The court continued to apply this reasoning until *Zobel I*. *See* State v. Wylie, 516 P.2d 142 (Alaska 1973) (holding a one-year residency requirement for preference for state employment unconstitutional); State v. Adams, 522 P.2d 1125 (Alaska 1974) (holding a one-year residence requirement in order to obtain a divorce unconstitutional); Gilbert v. State, 526 P.2d 1131 (Alaska 1974) (upholding a three-year residence requirement for declaring candidacy for public office because of a compelling state inter-

due to the notion that it results in a preordained outcome once the test to be applied is chosen.[38] It was felt that this places too much emphasis on the right to travel and gives no consideration to the substantive right the statute regulates. As a result of this growing discontent, the Alaska court explored the possibility of adopting a new approach for state equal protection analysis.

The Alaska court first tried using a more demanding replacement for the rational relationship test, still within the two-tier structure, in *Isakson v. Rickey*.[39] Explaining this heightened scrutiny, the court said that it would "no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard."[40] Tolerance of overinclusive and underinclusive classifica-

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est): Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977) (declaring the "Alaska hire" law, giving one-year residents preference for jobs in the petroleum industry, unconstitutional), *rev'd on other grounds*, 437 U.S. 518 (1978); Castner v. City of Homer, 598 P.2d 953 (Alaska 1979) (holding that a one-year residency requirement for candidacy for city office met compelling state interest test). One other equal protection case was heard in 1978, but the equal protection claim was not reached. Thomas v. Bailey, 595 P.2d 1 (Alaska 1978).

The United States Supreme Court had not, in fact, gone this far, as evidenced by *Maricopa County*, where the Court recognized that some durational residence schemes might not impact the right to travel enough to reach the threshold level necessary to trigger strict scrutiny. *See* notes 30 & 31 and accompanying text *supra*.

The Alaska Supreme Court's divergence from the United States Supreme Court's analysis is highlighted by the different holdings in State v. Adams, 522 P.2d 1125 (Alaska 1974) (one-year residence requirement in order to obtain a divorce violates the state constitution) and *Sosna* (one-year residency requirement in order to obtain a divorce does not violate the United States Constitution). *See* Note, *Durational Residency Requirements: The Alaskan Experience*, 6 U.C.L.A.-ALASKA L. REV. 50, 55 (1978). *Compare* State v. van Dort, 502 P.2d 453 (Alaska 1972) (75-day residency requirement in order to vote is unconstitutional) *with* Marston v. Lewis, 410 U.S. 679 (1973) (upholding Arizona's 50-day residency requirement for voting) *and* Burns v. Fortson, 410 U.S. 686 (1973) (upholding the closure of voter registration 50 days prior to the general election).

38. *See, e.g.*, note 30 *supra*. The Alaska Supreme Court recognized a growing dissatisfaction with the two-tier analysis in State v. Adams, 522 P.2d 1124, 1131 n.44 (Alaska 1974):

> We are not unmindful that application of the compelling state interest test has been criticized as being outcome determinative. Dunn v. Blumstein, 405 U.S. 330, 363, 92 S.Ct. 995, 1013, 31 L.Ed.2d 274, 296 (1972) (Burger, C.J., dissenting); Breese v. Smith, 501 P.2d 159, 177 (Alaska 1972) (Erwin, J., concurring). However, insofar as we can deduce, this criticism is only a reflection of growing discontent with the two-tiered equal protection standard of review. . . . Until this discontent crystallizes into a fully developed alternative test, we choose to follow the established two-tiered standard.

The court also said:

> The [Supreme] Court may be searching for a new equal protection analysis. Justice Marshall has tried to formulate a single basic test: "Whether there is an appropriate governmental interest suitably furthered by the differential treatment." Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212, 216 (1972).

522 P.2d at 1127 n.12.

39. 550 P.2d 359 (Alaska 1976). *See also Zobel II*, 619 P.2d 448, 452 n.12 (Alaska 1980), *prob. juris. noted*, 101 S. Ct. 1344 (1981).

40. 550 P.2d at 362. *See also* Lynden Transport, Inc. v. State, 532 P.2d 700, 706 n.10 (Alaska 1975): "We are in agreement with the view that the Supreme Court's recent equal protection deci-

tions was also reduced.[41] Raising the level of scrutiny at the lower tier did not solve the problem, however, since it was still difficult to determine when strict scrutiny was required.

Finding this unsatisfactory, the Alaska court adopted a balancing test for state equal protection analysis in *State v. Erickson*,[42] after first noting that strict scrutiny with its compelling state interest test was not applicable under federal analysis. The Alaska court's single balancing test takes into account the importance of the substantive rights involved as well as the burden on the right to travel. This test requires the state to bear the burden, gauged by the nature of the rights involved, to show that the classification has a fair and substantial relation to a legitimate governmental objective.[43] Where fundamental rights or suspect classifications are involved, the result is essentially the same as applying strict scrutiny.[44] This balancing test was adopted for analysis of equal protection challenges to durational residence classifications in *Zobel I*.[45]

C. *Summary*

The United States Supreme Court's equal protection analysis appears to be in a state of flux.[46] Although the Court has not rejected the two-tier

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sions have shown a tendency towards less speculative, less deferential, more intensified means-to-end inquiry when it is applying the traditional rational basis test and we approve of this development."

41. 550 P.2d at 362. *See also* Tussman & Tenbrock, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

42. 574 P.2d 1 (Alaska 1978).

43. *Id.* at 12 (footnotes omitted):

> Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a "compelling state interest"; but, by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made.
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> . . . .
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> . . . Initially, we must look to the purpose of the statute, viewing the legislation as a whole, and the circumstances surrounding it. It must be determined that this purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced therefore, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved.

It is important to note that "substantial relationship" is used in a flexible sense. If the nature of the rights demonstrates that the state carries a minimal burden, the statute need only meet the *Isakson* "rational relationship with bite" test. *See* Gunther, *supra* note 27.

44. 574 P.2d at 12.

45. *See* note 13 *supra*.

46. G. GUNTHER, *supra* note 16, at 673.

analysis, it may nevertheless be using a balancing approach, as evidenced by *Sosna v. Iowa*. The Alaska court, recognizing the inherent limitations of the two-tier approach, has explicitly adopted a balancing approach in testing state equal protection claims.

II. THE *ZOBEL II* COURT'S REASONING

In *Zobel II*, the Alaska court analyzed the income distribution statute[47] in two steps. First, recognizing that the act would have to pass federal constitutional muster, the act was tested under the federal two-tier analysis. Then the court tested the act under Alaska constitutional law using the balancing test.

A. *The Federal Equal Protection Claim*

Chief Justice Rabinowitz, writing for the plurality, noted that the United States Supreme Court had not applied strict scrutiny to all durational residence laws.[48] He derived from prior United States Supreme Court cases four possible "distinguishing factors"[49] to indicate whether

47. It is essential to understand exactly what the statute professes to accomplish. First, the statute recognizes the equitable ownership of the state's natural resources in each state resident. Alaska Sess. Laws ch. 21, § 1(c) (1980). Second, it recognizes the depletion of the natural energy resources, oil and gas, and the concomitant reduction in value of this equitable ownership. Alaska Sess. Laws ch. 21, § 1(b)(1) (1980). Third, it recognizes the legitimate state purpose of compensating the state's residents on an equal basis for this loss in value through the distribution of moneys derived from the exploitation of these resources. Alaska Sess. Laws ch. 21, § 1(b)(1) (1980).

The state of Alaska could not give each resident his or her share of the permanent fund because of state constitutional limitations. *See* note 3 *supra*. The state is apparently trying, through the distribution statute, to provide the income from this money that would otherwise be given outright to its residents on a yearly basis. Each year the resident remains in the state, he or she is awarded the right to receive the income from his or her share of that year's loss in value of natural resource ownership. Long-term residents would, of course, have accrued more rights to yearly income distributions. But this is no different from giving the principal to each resident every year and letting them invest it as they choose, a program that would raise no equal protection problems as long as each resident received the same amount of principal.

The court probably chose not to interpret the statute this way for three reasons. First, the argument was not set forth in the state's brief. Second, this interpretation could be seen as a convenient way of depriving the appellees of a federal right by evading the constitutional issue. *See* Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting). Third, the distribution scheme does not fit this "trust" theory perfectly. For example, the "principal" on which the "dividend" is paid should fluctuate each year with the amount of oil revenues received that year and the number of Alaskan residents. The scheme's effect on Alaskans under the age of 18 is also disturbing. Why should they receive no dividends if they are equitable owners? And why do they suddenly receive 18 dividends when they reach 18 years of age if they are not equitable owners until their 18th birthday? *See also Zobel II*, 619 P.2d 448, 464 n.1 (Alaska 1980) (Burke, J., concurring), *prob. juris. noted*, 101 S. Ct. 1344 (1981).

48. 619 P.2d at 455. *See* notes 27–30 and accompanying text *supra*.

49. 619 P.2d at 454–57.

there was sufficient impact on the right to travel to trigger strict scrutiny. These factors consisted of, first, whether the residency requirement is based solely on administrative, budgetary, or record-keeping considerations; second, whether the benefit denied by the state is a "basic necessity;"[50] third, whether the state absolutely denies a benefit, rather than merely delays its receipt;[51] and fourth, whether the state denies a "fundamental right"[52] such as voting. Each of these factors alone is sufficient to require strict scrutiny.

The court then analyzed the income distribution statute under each of these factors and concluded that strict scrutiny was not required. Thus, the applicable federal standard was the rational relationship test. Since the Alaska balancing test is stricter at the lower level than the federal analysis, the court reasoned that if the act withstood state equal protection analysis, it would likewise meet the federal test.

B. State Equal Protection Analysis Under the Balancing Test

The *Zobel II* court noted that the nature and extent of the infringement on the right to travel in this case could not be characterized as a penalty since even new residents received a dividend payment. Further, the court could not see how the statute could exert a deterrent effect on that right.[53] Thus, the court felt that any impact on the right to travel arising from the fact that the payment to a new resident was not as large as that realized by a long-term resident should be regarded as de minimis.[54]

The statute's purposes were: (1) to provide for the equitable distribution of at least a portion of the state's energy wealth; (2) to reduce population turnover in the state; and (3) to encourage increased awareness and involvement by the state's residents in the management of the permanent fund.[55] The court found that these purposes were legitimate and that the

50. *See* notes 24 & 25 and accompanying text *supra*.

51. *See generally* Sosna v. Iowa, 419 U.S. 393 (1975) (delay of right does not trigger strict scrutiny); Shapiro v. Thompson, 394 U.S. 618 (1969) (denial of right triggers strict scrutiny). *See also* note 33 *supra* and text accompanying notes 70–73 *infra*.

52. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (denial of the right to vote, a fundamental right, triggers strict scrutiny).

53. 619 P.2d at 458.

54. *Id.*

55. The state's purposes listed in the statute were:

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

Alaska Sess. Laws ch. 21, § 1 (1980).

classification was substantially related to each purpose.[56] Finally, declaring that the act did not deny equal protection of the law under the state constitution, and hence the federal constitution, the court held that the state's interests in using this particular means of furthering its objectives outweighed the minimal impact on the Zobels' rights.[57]

C. *The Concurring and Dissenting Opinions*

The Chief Justice spoke only for himself and one other justice out of the five justices who heard the case. The concurring justice, while disturbed with the prudence of adopting the dividend statute, agreed with the Chief Justice's result since he felt that the statute was subject only to review for arbitrariness.[58] The dissenting justices, on the other hand, felt that the statute could not be upheld under either the Alaska or the United States equal protection clauses. They set out two reasons for their conclusion: first, that the state could not impose an unlimited durational residency requirement; and second, that the state could not reward residents for past contributions when determining equitable distribution of the fund.[59]

III. ANALYSIS OF THE *ZOBEL II* PLURALITY OPINION

The *Zobel II* opinion demonstrates both the confusion in the present posture of federal equal protection analysis and the advantages of the balancing approach. As already noted, the United States Supreme Court has

56. 619 P.2d at 458–64.

57. *Id.* at 464.

58. *Id.* at 464–65.

59. The two dissenting justices claimed that the United States Supreme Court mandated an absolute limit in length of residency restrictions. 619 P.2d at 466 (Dimond, J., and Matthews, J., dissenting). *See* Vlandis v. Kline, 412 U.S. 441, 452 (1973); Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Burger, C.J., dissenting); Shapiro v. Thompson, 394 U.S. 618 (1969) (Warren, C.J., and Harlan, J., dissenting). None of these cases cited by the minority, however, are on point. They point instead to a requirement of reasonableness in length of residency restrictions which is derived from the statute's effect on the right to travel. Justice Stewart's dicta in *Vlandis*, relied upon by the dissenting justices in *Zobel II*, cannot be read as creating a requirement of reasonableness without reference to the effect on the right to travel since *Vlandis* was decided on due process grounds. Chief Justice Warren's dissent in *Shapiro* tied the determination of reasonableness to the impact on the right to travel. Shapiro v. Thompson, 394 U.S. 618, 644–55 (1969) (Warren, C.J., dissenting). Chief Justice Burger, dissenting in *Dunn*, merely felt that the penalty on the right to travel imposed by the denial of voting rights for a year was allowable since similar penalties are imposed on the young by the denial of voting rights until age 18. Since the limit on the length of residency restrictions is determined with reference to the statute's effect on the right to travel, the limit is already considered in both the two-tier and balancing analysis. The requirement of reasonableness in constitutional analysis cannot exist in the abstract, as Chief Justice Warren recognized in *Shapiro*, and therefore need not be considered further.

not made it clear when a statute will be tested using strict scrutiny.[60] Under the traditional two-tier analysis, virtually the only way a court can declare a statute unconstitutional is to apply strict scrutiny. To do this, courts have at times found that the right to travel has been deterred or penalized when it would seem that, in fact, it was not.[61] This artificial analysis leads to judicial and legislative confusion since it is not clear which of the two tests will be applied.[62] The balancing approach is not susceptible to this confusion.[63]

This section analyzes the *Zobel II* court's opinion[64] and concludes that the case was correctly decided. It also indicates some weaknesses the Alaska court did not address in its federal equal protection analysis, as well as weaknesses in the court's application of the balancing test. None of these faults, however, affect the outcome. This note argues that the balancing approach provides a more analytically sound and less artificial analysis than the federal approach. It concludes that, under either analysis, the Zobels' equal protection claim must be dismissed.

60. *See* notes 16–22 and accompanying text *supra*.

61. The finding of deterrence does not require a finding of actual deterrence. Thus, a statute may be struck down on the basis of speculative deterrence. The wisdom of such a doctrine is questionable. *See* Shapiro v. Thompson, 394 U.S. 618, 650–51 (1969) (Warren, C.J., dissenting).

62. *See* note 37 *supra*.

63. Rather than trying to determine what test to apply, the courts will focus on what should be the outcome of the case. Admittedly, it will at first be unclear how much weight should be given different non-fundamental rights. This will eventually be cleared up by precedent—indeed, already existing case law provides a somewhat adequate roadmap, as the discussion of the Zobels' rights demonstrates. *See* notes 82–89 and accompanying text *infra*.

64. The Alaska permanent fund income distribution statute poses a new problem for equal protection analysis that is not fully developed in the *Zobel II* opinion. *See* 619 P.2d at 454 n.19. In all prior cases dealing with classifications based on the length of residency in a state—*Sosna, Dunn, Shapiro* and *Maricopa County*—residents were denied outright a state benefit for a set period of time. After that time had elapsed, all residents were treated equally. The dividend statute, however, never completely denies benefits to newcomers. *See* text accompanying note 8 *supra*. There is, however, no set period of time after which all residents reach parity. Arguably, this statute does not penalize the exercise of recent interstate migration, nor does it act as a deterrent on that right. *But see* note 95 *infra*. Contrast the statute that was invalidated in *Zobel I*—there the new resident bore the entire burden while the longer term resident reaped the entire benefit. The purpose and function of the permanent fund income distribution statute is to provide an incentive to residents to remain in the state and to reward those who have remained. The purpose and function of the statutes involved in *Dunn, Shapiro, Maricopa County,* and *Zobel I* was to penalize people moving into the state.

The classification in *Zobel II* is not "recent interstate migration" as in *Dunn, Shapiro* and *Maricopa County,* so perhaps prior United States Supreme Court analysis, including the right to travel analysis, is inapplicable. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 258 (1974), where the Court inferred that if recent interstate migration was the basis for the classification, then the compelling state interest test was applicable. *See also* note 30 *supra*. The Alaska court held, however, that the classification in *Zobel II* was to be assessed by the same principles and criteria as the "recent interstate migration" classification. 619 P.2d at 454 n.19.

A. *The Court's Analysis of the Federal Equal Protection Claim*

Using the federal two-tier analysis, two questions are raised: (1) whether strict scrutiny or rational relationship analysis is applicable;[65] and (2) whether the challenged statute meets the chosen standard. There are two steps to answering the first question. First the court must determine if there is any impact on the right to travel. If an impact is found, the court must determine if the impact is enough to trigger strict scrutiny.

The *Zobel II* court explicitly examined the effect of the statute on the constitutional right to travel, both for deterrent and penalizing effect, and concluded that the impact was, at most, de minimis.[66] Rather than automatically applying the lower tier of the federal standard, however, the court went on to examine its four "distinguishing factors"[67] to determine whether strict scrutiny was triggered. Arguably, the Alaska court did not need to go this far. Since the court determined that there was de minimis impact, there apparently was no need to examine whether strict scrutiny would apply. Strict scrutiny is applicable only when there is measurable penalty or imaginable deterrence.

Even if there is an impact on the right to travel, the Alaska court's choice of indicia as to whether strict scrutiny is required is faulty. Only two of the factors the court cites, the "basic necessity of life"[68] and "fundamental right"[69] distinctions, have merit in determining when federal analysis requires strict scrutiny. Since the permanent fund dividends do not fall into either category, strict scrutiny is not triggered.

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65. *See* notes 16–22 and accompanying text *supra*.

66. The court found that:

> Examination of the nature and extent of the infringement of the constitutional right involved has led us to conclude that this legislative scheme cannot be said to "penalize" the right of interstate migration. . . . The new resident does, in fact, receive financial gain for exercising his or her right to move into Alaska; and whatever "penalty" may accrue from the fact that this gain is not as large as that realized by a long-term resident we regard as de minimis.
>
> In making this judgment, we are aware of the statements by the United States Supreme Court that a showing of "deterrence" is not necessary to a finding of an infringement upon the right to migrate; but it is also true that the Court has consistently relied upon the severity of the penalty inflicted upon the individual for exercising the right of interstate migration in reaching its results in various cases. In our view the permanent fund earnings distribution statute can only be characterized as a penalty with great awkwardness. We are therefore convinced that the exercise of the right of interstate migration is not penalized by the statute in question.

619 P.2d at 457–58 (footnote omitted).

67. *See* notes 49–52 and accompanying text *supra*.

68. *See* note 25 *supra*.

69. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972). Impact on a fundamental right would presumably trigger strict scrutiny even without the impact on the right to travel. If delaying access to a divorce court does not impact a fundamental right, it appears that allocating the receipt of non-vital governmental benefits based on years of residency would also not impact a fundamental right. *See* Sosna v. Iowa, 419 U.S. 393 (1975).

The court's choice of the delay-denial distinction[70] as an indicator is inappropriate for durational residence cases.[71] The important question is not whether there is a delay or a denial, but rather the extent of the statute's impact on the right to travel caused by the delay or denial.[72] Since here the impact is slight,[73] the court properly found that strict scrutiny should not be applied.

The fourth factor the *Zobel II* court identified, that the justifications put forth by the state must go beyond budgetary, recordkeeping, and administrative concerns,[74] was misplaced. This factor is relevant only in determining the state's interests in the legislation after the court has determined what level of scrutiny to apply.[75] The factor is of no help in determining which level of scrutiny the court is to use and should be rejected as an indicium of strict scrutiny.

Under the two-tier method, the rational relationship test was the proper test to apply since any impact caused by the statute does not reach the threshold level to trigger strict scrutiny.[76] The court, upon reaching this conclusion, stated that the rational relationship test would be met a fortiori if the state's purposes and the relationship between the means and ends met the state balancing test.[77] The Alaska court thus held that the balancing test applied a stricter scrutiny than the United States Supreme Court's rational relationship test.[78]

B. The State Equal Protection Balancing Test

Since the *Zobel II* court had to apply both the federal two-tier analysis as well as the state balancing test, this case provides an excellent contrast between the two approaches. In two-tier analysis, the determinative issue is what standard of review will be applied. In a balancing analysis, the issue is two-fold: first, whether the state can meet its burden, measured by the importance of and impact on the rights involved,[79] to show that the

70. *See* note 51 *supra*.
71. *See* note 33 *supra*.
72. *See* note 33 *supra*.
73. *See* notes 82–85 and accompanying text *infra*.
74. 619 P.2d at 455.
75. *See* notes 16–22 and accompanying text *supra*.
76. *See* notes 28–31 and accompanying text *supra*.
77. 619 P.2d at 457. Given the higher level of Justice Rehnquist's judicial scrutiny under the rational relationship test in *Sosna*, *see* note 34 *supra*, the Alaska Supreme Court's holding that the lower tier's scrutiny is less than that reached by the state balancing test may not be warranted. It appears, nevertheless, that both tests are applied with equal scrutiny, so that if the statute survives the *Erickson* balancing test, it also survives the *Sosna* version of the rational relationship test.
78. 619 P.2d at 457.
79. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*.

purposes of the statute are legitimate and that the means chosen substantially further those purposes;[80] and second, whether the state's interests in the particular means chosen outweigh the nature and impact on the individual rights involved.[81]

1. Examination of the Zobels' Rights

An examination of the statute's effect on the rights must include an examination of the effect on both the right to travel and the substantive right the statute regulates. An examination of the effect on the right to travel involves two steps: a determination as to whether an impact is present and, if so, a determination of how substantial the impact is.

The Alaska court's view that the impact on the right to travel was slight in this case is supported by United States Supreme Court precedent. The Supreme Court cases indicate that there is a certain minimum level of governmental benefits that cannot be withheld solely because of length of residency.[82] This "core" of services and benefits includes those vital services and benefits such as the right of indigents to medical care in *Maricopa County*[83] as well as the non-vital services such as schools, parks, and libraries mentioned in *Shapiro*.[84] In *Zobel II*, the dividends are a non-vital monetary benefit which is not completely denied to the new resident. The literal sense of the word "penalty" is simply inapplicable to the Alaska statute's effect on the short-term resident. It would be likewise difficult to suggest that the statute would deter anyone from moving into

80. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*.

81. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*.

82. In *Shapiro* the Supreme Court said that the equal protection clause prohibits apportionment of state benefits and services, such as schools, parks, libraries, and police and fire protection, on the basis of past tax contributions. Shapiro v. Thompson, 394 U.S. 618, 632–33 (1969). In *Maricopa County* the Court said that the right of interstate travel insures new residents the same right to vital governmental benefits and privileges as are enjoyed by other residents. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974). *See generally* National League of Cities v. Usery, 426 U.S. 833 (1976). In *Usery* the Court said that schools, hospitals, police and fire protection each provide "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *Id.* at 855 (footnote omitted).

83. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974).

84. Shapiro v. Thompson, 394 U.S. 618, 632–33 (1969). It is worthwhile to note that these "core" benefits and services are merely what one would expect to receive upon moving into any state. This argument is supported by the Court's affirmance of Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). The Court upheld the one-year residency requirement in *Starns* for lower state university tuition and, indeed, most people expect that they would have to pay nonresident tuition immediately upon moving into the state. The Court again noted its emphasis on the vital aspect of "core" benefits in Califano v. Torres, 435 U.S. 1 (1978) (per curiam).

the state.[85] Thus the Alaska court was correct in finding that the impact on the right to travel was slight.

The *Zobel II* court did not explicitly consider the substantive right involved, which is the right to receive non-vital monetary benefits.[86] Where more substantial rights are involved, the balancing test serves to protect those rights from discriminatory government action. The Alaska court's failure to address the substantive right in *Zobel II* was not a fatal error because of the minimal importance of the substantive right.[87] The Supreme Court held, in *Dandridge v. Williams,*[88] that a state's denial of equal per capita welfare payments to large and small families does not, by itself, trigger strict scrutiny and that such a denial is permissible under the rationality standard. Since the denial in *Zobel II* involved non-vital benefits, it cannot be deemed more significant than the denial in *Dandridge*.

Given the extent of the Zobels' rights, the state's burden to show that the classification bears a fair and substantial relationship to a legitimate governmental objective is not great. Indeed, prior United States Supreme Court decisions indicate that when the statute's impact on the right to travel is slight, and where the substantive right regulated is not significant, the state's burden requires little more than a showing of a rational basis.[89] Where more substantial rights are present, the state would bear a heavier burden.

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85. Perhaps the right to travel analysis is inapplicable in this case. *See* note 64 *supra*. Providing incentives to residents to keep them from leaving the state has never been held to be a burden on the right of interstate travel. *See* note 95 *infra*. Also compare the statute invalidated in *Zobel I*. In *Zobel I* the new resident received no benefit and bore the entire burden of tax liability. In contrast, under the dividend statute, the new resident simply does not receive as great a benefit as the longer term resident. *See* note 64 *supra*.

86. *See Zobel II*, 619 P.2d at 458. *But see Zobel II*, 619 P.2d at 463 (noting that the court is dealing with a law providing for governmental payments which "is entitled to a strong presumption of constitutionality" (quoting Califano v. Torres, 435 U.S. 1, 5 (1978)) and indicating that the Alaska court implicitly considered the underlying right involved).

87. *See* note 64 *supra*.

88. 397 U.S. 471 (1970). *See also* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973). In *Rodriquez*, the Court examined the substantive right involved, the right to equal quality of state education as measured by state expenditures, to see if it was afforded explicit or implicit protection under the Federal Constitution. Finding no such protection, and, additionally, no close nexus to another constitutionally protected right, such as the right to migrate or to vote, the Court refused to apply strict scrutiny. Upon application of the rational relationship test, the state expenditures were upheld. Justices Brennan, Marshall and Douglas, dissenters in *Dandridge*, were joined by Justice White in dissent in *Rodriquez*.

89. In some respects, then, the balancing approach can be seen less as an abandonment of two-tier analysis than a refocusing of the analysis to include several years of precedent. At least two Justices on the Court, Marshall and White, recognize that the Court has applied a "spectrum of standards." Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring). This note emphasizes the need to legitimize the precedent by reevaluating the critical factors that weighed in these cases, rather than focusing only on the rights involved. In *Zobel II*, the critical factor is that the

2. *Examination of the State's Interests and the Means Used to Further Them*

Under the balancing test, after the statute's impact has been assessed, the state's interests in the particular statute must be examined.[90] This again involves a two-step determination:[91] first, the purpose of the statute must be legitimate; and second, the classification scheme must substantially further the purpose.

The first listed purpose of the Alaska act is equitable distribution of part of the state's energy wealth,[92] a permissible state goal. Underlying this purpose, the court found a desire to reward residents based on past tangible and intangible contributions to the state's culture and commonwealth.[93] Analyzing the legitimacy of this underlying desire, the court recognized certain problems unique to the state of Alaska and its residents. These problems include the high cost of living, the harsh climate, and the fact that many people come to Alaska to derive great financial gain and then leave to enjoy the fruits of their labor elsewhere, resulting in a great drain of financial and other resources from the state.[94] The court felt that this underlying purpose was legitimate, reasoning that if states may constitutionally charge university students different tuition rates based on past tax contributions,[95] a state may likewise reward resi-

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benefit involved is not a "core" governmental benefit. *See* notes 83 & 84 and accompanying text *supra*. *See also* note 43 *supra*.

90. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*.

91. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*.

92. Alaska Sess. Laws ch. 21, § 1 (1980). *See* note 55 *supra*.

93. 619 P.2d at 458.

94. The Alaska Supreme Court cites several studies documenting this claim. *See Zobel II*, 619 P.2d at 459 n.33.

95. 619 P.2d at 460. *See* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971), *cited with approval in* Vlandis v. Kline, 412 U.S. 441, 452 n.9 (1973). *See also* Reeves, Inc. v. State, 447 U.S. 429 (1980) (state may restrict sales of cement from state owned plant to only state residents because they fund the state treasury).

There remains the question whether all states should be allowed to distinguish between their residents on the basis of their length of residency in providing "non-core" benefits and services based on any legitimate state purpose. It is possible that any state could put forth equitable distribution based on past intangible contributions as a legitimate state purpose. One may question, however, whether Alaska's special problems present more substantial state interests.

If all states could differentiate between their residents in providing "non-core" benefits and services, all states could initiate such programs rewarding their long-term residents. As short-term residents "built up" their residency payments the effect of their moving to another state and having to start all over again, thereby suffering a financial loss, would be a severe deterrent. What could conceivably result, then, would be pockets of long-term residents in each state and severely constrained interstate migration.

The court dealt with this issue by raising three points. First, this issue was not argued by the challengers. Second, if it had been, the challengers would probably have lacked standing to complain since they had not alleged a desire to leave. Such an argument by one wanting to leave or who

dents for other past contributions.[96] Noting that the fit between means and ends need not be perfect since the state's burden is not great,[97] the court determined that the classification sufficiently furthered this equitable distribution so as to tip the scales in favor of constitutionality.

The second listed purpose of the statute is to encourage Alaskan residency and to remedy the persistent problem of population turnover.[98] This is a legitimate state goal because it furthers the state's economic interest in stabilizing its economy.[99] Rewarding residents with monetary benefits clearly furthers this state goal,[100] as does the underlying promise of future increasing benefits.[101] Thus a court could find that the distribution plan substantially furthers the goal of providing incentives to maintain state residency even though the benefit to some is small.

The third state purpose is to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.[102] The court viewed increased citizen awareness and involvement as a means of insuring the prudent management of the fund, as well as the state's natural resources, so that the fund would produce income for future years. Giving residents a direct monetary interest in the fund furthers this goal. Since state legislators serve as a conduit between the residents' desires and the management of the fund, it could be argued that the chain is somewhat weak. But since the only way

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left is seemingly foreclosed by the Court's holding in Califano v. Torres, 435 U.S. 1 (1978) (per curiam). The Court, in denying that a social security recipient was entitled to benefits upon moving to Puerto Rico, even though he had been receiving them in Connecticut, said that the right to travel doctrine did not require a state to continue to pay benefits, that were provided for its residents indefinitely, to any person who had once resided there. *Id.* at 4.

Third, the "loss" involved in this circumstance would stem not from the durational residency link, but rather from the simple residence requirement, and would thus be subject to a completely different analysis. *Zobel II*, 619 P.2d at 461 n.36. The relevant analysis would be under the privileges and immunities clause.

96. *But see Zobel I*, 619 P.2d at 429 (holding that the state could not apportion the tax burden to residents on the basis of past tax contributions, citing *Shapiro* as support).

97. *See* note 43 *supra*. The Alaska court claimed there was an absence of preferable alternatives. The discussion of preferable alternatives was raised too early by the court in its analysis. Alternatives should be discussed in connection with the state's interests in the particular classification system which is the last part of the balancing test. *See* notes 104–110 and accompanying text *infra*.

98. Alaska Sess. Laws ch. 21, § 1 (1980). *See* note 55 *supra*.

99. Encouraging residency would stem the outflow of the state's resources. *See* text accompanying note 94 *supra*. This is a good argument for consideration of the state's special problems since it supports a finding that this is not just some theory made up to justify invidious discrimination. *See Zobel II*, 619 P.2d at 459 n.33.

100. Per capita distribution might accomplish the same thing. But per capita distribution could be viewed by residents as merely a cost of living allowance whereas yearly increasing benefits would create additional incentive to stay. In any event, this analysis should have been left to the last part of the balancing test. *See* notes 104–110 and accompanying text *infra*.

101. Each year the resident's benefit increases. *See* notes 1–7 and accompanying text *supra*.

102. Alaska Sess. Laws ch. 21, § 1 (1980). *See* note 55 *supra*.

for residents to participate in the fund's management is through their legislators, the direct cash benefit works to further this legitimate goal.[103]

3. *Balancing the Alternative Means Against the Zobels' Rights*

After the rights have been assessed, the state's purposes found legitimate, and the classification system sufficiently related to the purposes, the court balances the state's interest in using the particular means against the nature of the constitutional rights involved.[104] This part of the analysis should involve a balance, based on the nature of and impact on the rights involved,[105] between the dividend statute's classification and possible alternatives the state might have employed to accomplish the statute's purposes.[106]

The *Zobel II* court found that there were no reasonable alternatives to the state's distribution plan. In its determination that the dividend statute substantially furthered the first state purpose, the court found that there were no clearly preferable alternatives to the dividend statute for rewarding past contributions.[107] Similarly, as to the third purpose, the court found that per capita distribution was not a preferable alternative,[108] although the dissent disagreed. But taking the three state purposes together, there are no clear preferable alternatives,[109] particularly when measured against the minimal impact on the right to travel and the significance of the substantive right regulated.[110]

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103. Per capita distribution would result in the dilution of individuals' shares as population increased. The court claimed that constituents would thus pressure state representatives to provide for the highest possible percentage return on the permanent fund principal investments. This would require riskier investments. A parallel argument was made for the management of the state's resources from which the fund is increased. This analysis should have been left to the last part of the balancing test. *See* notes 104–110 and accompanying text *infra*.

104. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*.

105. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). *See* note 43 *supra*. For an analysis of the Zobels' rights, see notes 82–89 and accompanying text *supra*.

106. The court, in *Zobel II*, did not explicitly engage in this balancing. Indeed, the opinion could be read as adopting an ad hoc balancing of the Zobels' rights and the state's interests. *See Zobel II*, 619 P.2d at 457 n.30. This is not the mandate of *Erickson*. *See* note 43 *supra*.

107. *See* note 97 *supra*.

108. *See* note 103 *supra*.

109. *See* notes 97 & 103 *supra*.

110. Where, as here, a close case of constitutionality is presented, the presumption of constitutionality in favor of statutes providing for governmental payments of monetary benefits will tip the scale. Califano v. Torres, 435 U.S. 1 (1978) (per curiam) (law providing for governmental payments of monetary benefits is entitled to a strong presumption of constitutionality). It should be noted that this presumption is substantially weakened when there is evidence of discriminatory intent, as indeed there may be here. *See* Brief for Appellee at 18 & 19, Williams v. Zobel, 619 P.2d 448 (Alaska 1980), *prob. juris. noted*, 101 S. Ct. 1344 (1981).

4. *Summary*

In summary, although the court did not apply the balancing test exactly as it was originally formulated, the outcome was proper. This area of constitutional law is particularly murky. Each new proposal for analysis should be set out clearly and followed rigorously. Otherwise the new proposal does little to provide guidance to the courts and legislatures. Thus it is suggested that in the future the Alaska court follow its equal protection analysis more diligently. The court's application of federal two-tier analysis is not subject to the same criticism, however, since the present posture of that analysis is not clear.

IV. PROPOSAL

It is time for the United States Supreme Court to explicitly adopt a balancing approach to durational residence equal protection analysis, if not for all equal protection cases. The two-tier analysis is no longer workable after the recognition, in *Maricopa County,* that there are levels of impact on the right to travel.[111] It is impossible to draw a line, based on the notion of a threshold amount of impact on the right to travel, where rational relationship scrutiny ends and strict scrutiny begins. Even if such a line could be drawn, it would be illogical to apply a highly deferential test if the statute's penalty almost reached the threshold but a rigorous strict scrutiny test if the impact is found to be just over the threshold. In contrast, the balancing test does not draw these artificial lines.

Furthermore, the two-tier approach ignores the importance of the substantive right the statute regulates. The right of equal protection of the law, in cases where the right to travel is not heavily impacted, may warrant more than rationality review, as recognized in *Sosna.* The balancing test allows increased scrutiny for rights that the Court has deemed more weighty yet has not protected by strict judicial review.

The criticisms of the balancing approach may well rest on the ad hoc nature of the test. The two-tier test, though, cannot be defended on this ground since it is ad hoc in its application. In order to strike down a statute under the two-tier approach, the Court must, essentially, find that the denial of the substantive right impacts the right to travel sufficiently to trigger strict scrutiny. This leads, at times, to an artificial analysis[112] that causes legislative and judicial confusion. The balancing approach provides a more consistent doctrine because it does not require artificial determinations of impact to justify greater judicial scrutiny. Through Su-

111. *See* notes 28–31 and accompanying text *supra.*

112. *See* note 61 and accompanying text *supra.*

preme Court precedent already set out, as well as future interpretations, much of the ad hoc nature of the balancing approach can be alleviated.

The *Zobel II* appeal presents an opportunity for the United States Supreme Court to explicitly adopt a balancing approach. This test examines the nature and the importance of the rights involved, then determines whether the asserted purposes of the statute are permissible and legitimate, and whether the means chosen substantially further the statutory goals. Finally, the state's interest in the chosen means is balanced against the nature of and impact on the rights involved.

V. CONCLUSION

The Alaska court correctly decided *Zobel II* using both the federal two-tier analysis as it currently exists and the balancing test. Under federal analysis, strict scrutiny is not triggered, and the statute certainly passes the rational relationship test. The statute was also validated under the balancing test. Since the right to travel was not substantially impacted, and since the substantive right that the statute regulates was not of great significance, the state met its minimal burden of demonstrating a legitimate state interest in the statute. Likewise, the state met its burden of showing that the means selected by the legislature substantially further the state's goals. Finally, on balance, the state's interest in the chosen means outweighs the Zobels' rights.

On appeal, the United States Supreme Court should adopt the balancing approach, and uphold the statute. The two-tier analysis is no longer tenable as it is confusing and places too much emphasis on the right to travel at the expense of other substantive rights.[113]

E. Thaddeus Lewis

113. The author expresses no opinion as to the wisdom in enacting the permanent fund income distribution statute. Having decided that the statute does not create a suspect classification, *see* note 19 *supra*, or affect a fundamental right, *see* section III.B.1. *supra*, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ." New Orleans v. Dukes, 427 U.S. 297, 303 (1976).